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No. 02-311

IN THE

Supreme Court of the United States

KEVIN WIGGINS,

Petitioner,

v.

THOMAS R. CORCORAN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF JANET F. RENO, *et al.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

This brief is filed on behalf of present and former federal, state, and local prosecutors who share the view that effective representation at the sentencing phase of a death penalty proceeding is necessary to promote a fair and efficient criminal justice system and to maintain public confidence in the enforcement of the death penalty. Although the signatories to this brief have different views regarding the death penalty – some support it, while others oppose it – all agree that if our criminal justice system has a death penalty, it must be administered pursuant to a process that is fair, and in a manner that will instill public confidence in the criminal justice system.[1]

SUMMARY OF ARGUMENT

Amici submit this brief to address the particular interests of prosecutors that we believe justify a strong statement by this Court requiring adequate investigation into mitigating evidence by defense counsel in a capital case. *First*, *amici* are concerned that the Fourth Circuit's decision suggests that defense counsel in a death penalty case does not have an obligation to conduct an investigation of mitigating evidence. 288 F.3d at 640-41. As prosecutors, we believe that such a reading misstates this Court's precedents, is bad policy, and is contrary to important prosecutorial interests. Ineffective

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1. A list of the *amici* who are filing this brief is set forth in the Appendix. Counsel for a party did not author this brief in whole or in part and no person or entity, other than the *amici curiae* or counsel, has made a monetary contribution to the preparation or submission of the brief. The parties have consented to the filing of *amicus* briefs, and copies of their consents have been filed with the Clerk of the Court.

representation by defense counsel can lead to conviction of innocent persons, and renders convictions and death sentences needlessly vulnerable on direct appeal and collateral review. Concerns about the fairness and accuracy of the administration of the death penalty have even led two states to impose a moratorium on carrying out death sentences after the entire appellate and post-conviction process has been completed. Through all of this – direct appeals, collateral proceedings, retrials, and system-wide moratoriums – crime victims and their families are denied the closure that the verdict should render, and the public is denied the finality of outcome that an effective criminal justice system should ensure.

Moreover, the vigor of our adversary system underlies public and jury support for our criminal justice system. It is of the utmost importance in maintaining that public support that counsel appointed in capital cases provide vigorous and effective representation in all phases of the proceeding. Effective representation in and presentation of a capital case requires extensive preparation for both the guilt and the sentencing phases, and can only be accomplished after defense counsel has conducted a thorough investigation into whether death is an appropriate sanction under the law in light of the defendant's background. Condoning imposition of a death sentence where the defendant has not had the benefit of such an investigation will, in the long run, undermine public confidence in the criminal justice system as a whole.

Second, providing effective representation at the outset of a case will significantly reduce the amount of resources that must be expended in capital cases. Ineffective assistance of counsel claims typically require the government to defend

counsel's performance against second-guessing on appeal or post-conviction proceedings, and may ultimately result in a retrial. Indeed, the cost of post-conviction litigation of *Strickland* claims – which are complicated and often require evidentiary hearings on multiple procedural and constitutional questions – can exceed the cost of the original trial. Similarly, effective assistance of counsel generally, and a proper mitigation investigation by defense counsel in particular, can assist prosecutors in better managing already scarce public resources. As the Judicial Conference of the United States concluded in its study on the federal death penalty, "[s]ince an early decision not to seek death is the least costly way to resolve a potential capital charge, a prompt preliminary mitigation investigation leading to effective advocacy with the Justice Department is critical both to a defendant's interests and to sound fiscal management of public funds." JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE ON DEFENDER SERVICES, SUBCOMMITTEE ON FEDERAL DEATH PENALTY CASES, FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION § II.1 (1998). These costs – as well as the potential unfairness to crime victims and their families – can be avoided or substantially reduced if effective representation is provided at trial.

ARGUMENT

I. EFFECTIVE REPRESENTATION BY DEFENSE COUNSEL AT TRIAL HELPS ENSURE THAT THE DEATH PENALTY IS FAIRLY ADMINISTERED

A. Effective Defense Counsel Ensures the Fairness and Accuracy of Pre-Trial and Trial Proceedings

Prosecutors face few dilemmas more troubling than defense counsel who are of marginal competence, or worse. Ineffective defense counsel increases the possibility that an innocent defendant will be convicted – a prospect that is troubling in any criminal case, but particularly when the possible outcome is execution.[2] Moreover, inadequate representation by defense counsel at trial undermines the likelihood that any conviction obtained will be sustained on appeal or in post-conviction proceedings. Inexperienced or ineffective counsel are more likely to commit errors themselves and less likely to object to prosecutorial error. This can lead to mistrials, reversals on appeal or post-conviction relief; even taking into account the plain error standard and the deference accorded state court judgments under the habeas corpus statute, 28 U.S.C. § 2254, these errors can multiply the number, complexity, and cost of post-conviction proceedings.

In short, prosecuting a case against incompetent defense counsel injects a degree of uncertainty and risk into the trial

2. In the instant case, while voting to reverse the grant of a writ of habeas corpus, Chief Judge Wilkinson felt moved to express some doubt about petitioner's guilt. *Wiggins v. Corcoran*, 288 F.3d 629, 643 (4th Cir. 2002). The existence of such doubt on the part of a respected federal appellate judge surely does not add to public confidence in the criminal justice system.

process which increases the burden upon any prosecutor who wants a conviction to stand up to the scrutiny of the appellate and post-conviction system. Incompetent counsel can lead to wrongful convictions, and can imperil convictions even in the most solid cases where there is virtually no question of guilt. Ineffective assistance thus endangers innocent defendants, defeats the important goal of finality in the criminal process, *see, e.g., Kuhlmann v. Wilson*, 477 U.S. 436, 453 & n.16 (1986), and deprives crime victims and their families of the closure to which they are entitled.

These concerns have led prosecutors to recognize the importance of providing an adequate defense to criminal defendants. Indeed, most prosecutors do not fear capable defense counsel in a capital case, but welcome them, as many have said publicly:

- **Paul Logli** (State's Attorney, Winnebago County, Illinois): "No one, especially prosecutors, wants incompetent defense lawyers on the other side of the counsel table, especially in a murder case. . . . Any prosecutor who has had to retry a case more than once, especially a capital case, is most supportive of good and competent counsel for the defense. It benefits no one, especially victims, to have to retry a major case."[3]

- **Stuart Van Meveren** (District Attorney for the Eighth Judicial District, Fort Collins, Colorado): "I want to make you aware of a little

3. *Protecting the Innocent: Proposals to Reform the Death Penalty: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. (2002).

known fact—most experienced prosecutors want a competent defense counsel. . . . To my mind there is nothing worse than retrying a case on the merits—memories have faded, evidence may be lost, and the victim must reawake scars that have hopefully been healed to some degree. . . . [With incompetent counsel avoiding retrial is] more difficult because you need to make sure the defense counsel doesn't accidentally create error that will lead to reversal."[4]

- **Ronald Eisenberg** (Deputy District Attorney, Philadelphia, Pennsylvania): "I believe there is no real disagreement on this goal; I know of no prosecutor who does not desire an active, ethical capital defense bar pursuing clients' interests. Such quality representation is necessary to achieve justice, public confidence, and efficiency."[5]

- **Beth Wilkinson** (former federal prosecutor in the Oklahoma City bombing case): "As a prosecutor, I wanted both Timothy McVeigh and Terry Nichols to be represented by a good defense lawyer for many reasons. First and foremost, a competent defense counsel is

4. *Innocence Protection Act of 2000: Hearing Before the House Comm. on the Judiciary, Subcomm. on Crime*, 106th Cong. 160-61 (2000).

5. *Protecting the Innocent: Ensuring Competent Counsel in Death Penalty Cases: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. 48 (2001).

essential in getting at the truth. I wanted the defense to do a thorough investigation to make it easy for the appellate court to decide there had been a fair trial. . . . I also wanted the families of the victims to rest knowing the perpetrators were punished. When a defendant has ineffective counsel the state, the families of victims, and society all suffer. Litigation becomes protracted, complicated and costly, putting legitimate convictions at risk."[6]

- **Roscoe Howard** (now U.S. Attorney for the District of Columbia): "Trials conducted improperly because of poor and inadequate representation by defense counsel end up becoming retrials or a rehearing. . . . [The state] ends up paying for the time of the court, its personnel, the prosecutor, and a different, if not competent, defense counsel for the second trial. . . . The prosecutor's goal is to do the trial once and do it right. . . . This should be the goal of the criminal justice system in general and the death penalty courts in particular. Ineffective defense counsel defeats this goal."[7]

- **W.A. Drew Edmonson** (Attorney General, State of Oklahoma): "No Attorney General I know, not a single prosecutor I have ever

6. *Protecting the Innocent: Ensuring Competent Counsel in Death Penalty Cases: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. 54 (2001).

7. Roscoe C. Howard, Jr., *The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W. VA. L. REV. 863, 890-91 (1996).

> known, and certainly no judge or jury, wants to be responsible for the incarceration, much less the execution of an innocent person. . . . In my county, we had judges that happened to look for the best lawyers to handle capital cases, and as a result of that no death penalty case during my term as district attorney or preceding it out of Muskogee County has been reversed. . . . What we worried about was the [defendant] who came in and hired the guy who did his worker's comp case to defend him in a capital case."[8]

Surveys of law enforcement personnel similarly have found widespread support for providing effective defense counsel to criminal defendants.[9]

B. Effective Representation By Defense Counsel Underpins Public Confidence in the Criminal Justice System

This Court, in its pronouncements on the Sixth Amendment right to counsel, has continuously emphasized

8. *Post-Conviction DNA Testing: When is Justice Served: Hearing Before the Senate Comm. on the Judiciary*, 106th Cong. 18, 83-84 (2000).

9. For example, a 1988 survey of law enforcement officials performed by a blue-ribbon commission of the American Bar Association concluded: "Prosecutors and police appreciate the role of the defense lawyer and do not believe that these lawyers impair their ability to control crime or to prosecute crime effectively. . . . [T]he problem is not that the defense representation is too aggressive but that it is too often inadequate. . . ." AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE SECTION, CRIMINAL JUSTICE IN CRISIS Intro. § k.8 (1988).

that an effective and vigorous adversary system is essential to the proper functioning of our criminal justice system. "From the very beginning, our state and national constitutions have laid great emphasis on procedural and substantive safeguards designed to assure fair trials. . . . This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). Indeed, this Court has emphasized that "[t]he right to counsel *is* the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (emphasis added).

Awareness of this right has permeated public awareness; the "courtroom drama" is a staple of television and motion pictures, and the *Miranda* warnings' invocation of the right to counsel has become "part of our national culture." *Dickerson v. United States*, 530 U.S. 428, 443 (2000). Indeed, numerous commentators have noted that the *Gideon* decision is at the center of the public's belief that the criminal justice system is administered in a fair manner, and does not lead to erroneous convictions. *See, e.g.*, Yale Kamisar, *The Gideon Case 25 Years Later*, N.Y TIMES, Mar. 10, 1988, at A27 (*Gideon* is "one of the most popular decisions ever handed down by the Supreme Court"); William G. Ross, *Attacks on the Warren Court by State Officials: A Case Study of Why Court-Curbing Movements Fail*, 50 BUFF. L. REV. 483, 606 (2002) ("the Court's early decisions on criminal procedure, particularly its decision on right to counsel in *Gideon v. Wainwright*, were broadly hailed for their fundamental fairness, an attitude that in part reflected changing public attitudes toward poverty") (footnote omitted).

As Attorney General John Ashcroft has stated, "Public confidence is an essential component to the administration

of justice."[10] Many prosecutors have recognized that effective defense representation is essential to ensuring continued public support for the system:

- **Hon. Gerald Kogan** (former Chief Justice of the Supreme Court of Florida and former Head of the Capital Crimes Prosecution Unit in Dade County, Florida): "Far too often, the adversary system does not work. Instead it breaks down because the defense attorney is not experienced, not competent, or in some cases, not even awake or sober. In these cases, the verdicts are not reliable and work only to undermine and destroy public confidence in the judicial system."[11]

- **Hon. William S. Sessions** (former Director, Federal Bureau of Investigation): "Given the high stakes – literally life and death – we need to be as certain as possible about the guilt of the accused person before sentencing that person to die. In today's environment we have . . . capabilities that will better assure that certainty . . . [including] better safeguards in the system to ensure that those arrested have competent defense counsel."[12]

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10. *United States Department of Justice: Oversight Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. 31 (2001).

11. *Innocence Protection Act of 2000: Hearing Before the House Comm. on the Judiciary, Subcomm. on Crime*, 106th Cong. 181 (2000).

12. *Post-Conviction DNA Testing: When is Justice Served?: Hearing Before the Senate Comm. on the Judiciary*, 106th Cong. 219 (2000).

- **Eliot Spitzer** (Attorney General, New York State): "Ultimately, the integrity of our criminal justice system rests on the assurance that capital defendants have competent counsel. . . . Competent counsel, after all, is a key element in ensuring that the innocent go free, that the guilty are caught, and that the criminal justice system adheres to the highest standards of constitutional practice."[13]

- **Hon. William Delahunt** (former District Attorney, Norfolk County, Massachusetts; Member of Congress): "The two most effective steps we can take to ensure greater fairness and accuracy in the administration of justice [are] access to post-conviction DNA testing, and the right to competent counsel in death penalty cases. . . . We must take steps to prevent wrongful convictions in the first place. And the single most important step is to ensure that every indigent defendant in a capital case has a competent attorney."[14]

As prosecutors, we recognize that the fairness of the administration of criminal justice is of the utmost importance in maintaining public and jury support for the entire criminal justice system. As noted above, we have different views on the appropriateness of the death penalty as a punishment. But we all recognize that the death penalty is, at present, part of that system, and a highly visible one. And we all agree that if there

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13. *Innocence Protection Act of 2000: Hearing Before the House Comm. on the Judiciary, Subcomm. on Crime*, 106th Cong. 188-89 (2000).

14. *Protecting the Innocent: Proposals to Reform the Death Penalty: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. (2002).

is to be a death penalty, it is paramount that capital punishment be administered by a process that is free of any hint of unfairness. Perceived unfairness in the administration of the death penalty will have an adverse impact on public support for the entire structure of our criminal law.

We take note of indications of public concern that the death penalty is not fairly administered, including concerns that defendants may have been wrongfully convicted, and that the death penalty is applied unevenly.[15] Public concern about the administration of the death penalty is reflected in the decision of two states – Illinois and Maryland – to implement moratoriums on the execution of capital sentences, even for defendants whose convictions and sentences have survived the appellate and post-conviction process.[16] Moreover, public

15. Public opinion research polls since mid-2000 have reported significant public concern with the fairness in the administration of the death penalty. *See, e.g.*, Gallup News Service Poll, May 20, 2002 (only 53% of those polled believe the death penalty is applied fairly, and 40% say it is applied unfairly) (available at http://www.gallup.com/poll/releases/default.asp?YR=2002&MO=5); Harris Interactive Poll, July 20-25, 2001 (94% of Americans believe innocent people are sometimes convicted of murder and that on average, 12% of those convicted of murder are innocent) (available at http://www.harrisinteractive.com/harris_poll/index.asp?PID=252); ABC News Poll, April 24, 2001 (67% of Americans believe the death penalty is unfair because of mistaken executions) (available at http://www.washingtonpost.com/wp-srv/nation/sidebars/polls/050301deathpoll.htm); NBC/Wall Street Journal Poll, July 28, 2000 (42% of voters think the death penalty is not applied fairly) (available at http://www.pollingreport.com/crime.htm); CNN/USA Today/Gallup Poll, June 23-25, 2000 (80% of Americans believe an innocent person has been executed in the United States in the past five years) (available at http://www.pollingreport.com/crime.htm).

16. The Governors of Illinois and Maryland both cited questions about fairness in the administration of the death penalty in declaring

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concern about the fairness with which the death penalty is administered could translate into unwillingness on the part of jurors to convict guilty defendants or to follow the law.

To the extent that the Fourth Circuit's decision suggests that inadequate performance in a death penalty case can be excused, we are concerned that it does not redound to the credit of the system. A strong statement from this Court that it will not condone or excuse substandard performance in death penalty representation will enhance public confidence in the criminal justice system.

C. Prosecutors Expect That Defense Counsel Will Conduct and Present a Thorough Mitigation Defense in a Death Penalty Sentencing Proceeding

As this Court noted in *Williams v. Taylor*, 529 U.S. 362, 396 (2000), counsel in a death penalty case has an "obligation to conduct a thorough investigation of the defendant's background." Since this Court reaffirmed the constitutionality of the death penalty in *Gregg v. Georgia*, 428 U.S. 153 (1976), prosecutors have come to expect that this investigation is part of the defense function in a capital

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moratoriums. *See* Statement of Governor George H. Ryan (Jan. 31, 2000) (available at www.state.il.us/gov/press/00/jan/morat.htm); Statement of Governor Parris R. Glendening (May 9, 2002) (available at http://www.gov.state.md.us/gov/press/2002/may/html/ baker.html). *See also* J. Kircheimer, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. COLO. L. REV. 1, 43-48 (2002) (noting that the Nebraska and New Hampshire legislatures had also enacted moratorium legislation, although these bills were vetoed by governors of those states, and that similar measures were being considered in a wide variety of jurisdictions).

case and that defense counsel will undertake it seriously. This obligation stems from the importance of a fact-finder's consideration of mitigating evidence in ensuring that the death penalty is imposed only when appropriate under the law. As this Court has written, the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989) (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion) and *Eddings v. Oklahoma*, 455 U.S. 104, 119 (1982) (O'Connor, J., concurring)) (internal punctuation omitted).[17] Thus, the Judicial Conference concluded that the work of "[p]enalty phase investigators . . . is part of the existing 'standard of care' in a federal death penalty case." JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE ON DEFENDER SERVICES, SUBCOMMITTEE ON FEDERAL DEATH PENALTY CASES, FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION § II.7 (1998).

Prosecutors thus expect that any lawyer who is defending a client facing the death penalty will conduct a thorough, vigorous investigation of any potential mitigating evidence, and, barring extraordinary circumstances, will make any such

17. *See, e.g.*, *Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987) (reversing death sentence where jury instruction limited mitigating factors jury could consider); *Skipper v. South Carolina*, 476 U.S. 1, 4-8 (1986) (reversing death sentence where trial court excluded mitigating evidence as irrelevant); *Eddings*, 455 U.S. at 113-16 (reversing death sentence where sentencing judge refused to consider mitigating evidence); *Lockett*, 438 U.S. at 604-08 (plurality opinion) (reversing death sentence and striking down Ohio death penalty statute where statute limited mitigating evidence sentencing judge could consider).

evidence known to the jury at the sentencing phase of the proceeding. The expectation that defense counsel will conduct a thorough investigation of mitigating evidence is also reflected by many federal and state courts which have concluded that counsel's failure to investigate mitigating evidence thoroughly in preparation for a sentencing hearing in a death penalty case constitutes ineffective assistance of counsel.[18] Indeed, the investigation of mitigating evidence

18. *See, e.g.*, *Hall v. Washington*, 106 F.3d 742, 746, 749-50 (7th Cir. 1995) (failure to interview potential mitigation witnesses is inadequate; "counsel must at least take the time to contact those witnesses and determine for himself whether their testimony would be helpful"); *Baxter v. Thomas*, 45 F.3d 1501, 1514-15 (11th Cir. 1995) (counsel was ineffective for failing to take any steps to uncover mental health mitigating evidence that was readily available); *Kenley v. Armontrout*, 937 F.2d 1298, 1304, 1307-08 (8th Cir. 1991) ("counsel must exercise reasonable diligence to produce exculpatory evidence and strategy resulting from lack of diligence in preparation and investigation is not protected by the presumption in favor of counsel. . . . Failing to interview witnesses or discover mitigating evidence relates to trial preparation and not trial strategy"); *Brewer v. Aiken*, 935 F.2d 850, 857 (7th Cir. 1991) ("defense counsel's failure to investigate the mental history of a defendant with low intelligence demonstrates conclusively that he did not make a significant effort, based on reasonable investigation and logical argument, to ably present the defendant's fate to the jury", and thus was ineffective) (internal quotations omitted); *Middleton v. Dugger*, 849 F.2d 491, 494 (11th Cir. 1988) ("mitigating evidence [relating to defendant's mental diseases] was readily discoverable had trial counsel performed a reasonable background investigation, and his failure to marshal this already existing mitigating evidence was outside the range of professionally competent assistance"); *In re Marquez*, 822 P.2d 435, 443, 447 (Cal. 1992) (holding that counsel's performance was deficient because "there was no penalty phase investigation conducted in this case with respect to petitioner's character, background, and conduct as a youth"); *Hildwin v. Dugger*, 654 So. 2d 107, 109 (Cont'd)

is so central to the administration of the death penalty that the federal government requires prosecutors to consider potential mitigating evidence in requesting authorization to seek the death penalty. The Department of Justice's *United States Attorney's Manual* provides that:

> In determining whether or not the Government should seek the death penalty, the United States Attorney, the Attorney General's Committee, and the Attorney General must determine whether the statutory aggravating factors applicable to the offense any non-statutory aggravating factors sufficiently outweigh the mitigating factors applicable to the offense to justify a sentence of death . . . . [A]ny mitigating factor reasonably raised by the evidence should be deemed established and weighed against the provable aggravating factors. . . . The authorization process is designed to promote consistency and fairness.

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(Fla. 1995) ("trial counsel's sentencing investigation was woefully inadequate. . . . For example, trial counsel was not even aware of Hildwin's psychiatric hospitalizations and suicide attempts"); *People v. Perez*, 592 N.E.2d 984, 995 (Ill. 1992) (concluding that defense counsel's "failure to investigate defendant's background with the information [defense counsel] possessed" fell "below an objective standard of reasonableness"; defense counsel had school records containing the name of family members and qualified school psychologists and had a conviction record; yet counsel "failed to investigate any of this information or send his court-appointed investigator to investigate. . . ."); *Louisiana v. Sanders*, 648 So.2d 1272, 1293 (La. 1994) ("counsel's failure to prepare at all for the penalty phase . . . resulted in advocacy for the defendant that was tepid and virtually non-existent") (internal quotation omitted).

UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL § 9-10.080. *See also* UNITED STATES DEPARTMENT OF JUSTICE, CRIMINAL RESOURCE MANUAL §§ 74-83 (requiring evaluation of potential statutory and nonstatutory mitigating factors in requesting authorization from the Department of Justice to seek the death penalty).

Given this consensus about the importance of a thorough investigation by defense counsel into mitigating factors, the Fourth Circuit's suggestion that a duty to investigate does not exist, 288 F.3d at 640-41, cannot be accepted. Permitting defendants to be convicted and sentenced to death when their counsel have not adequately investigated potential mitigating circumstances would be contrary to the prior holdings of this Court and would undermine public confidence in the process by which those convictions are secured. It would thus run contrary to important prosecutorial interests. Accordingly, we urge the Court to reaffirm its holding in *Williams v. Taylor* that a full investigation into potential mitigating circumstances is an essential aspect of the effective assistance of counsel in a death penalty case.

II. PROPER PRESENTATION AND INVESTIGATION OF MITIGATION EVIDENCE CAN SIGNIFICANTLY REDUCE COSTS ON LAW ENFORCEMENT

Effective representation by defense counsel at trial (including proper investigation of mitigating evidence by defense counsel in a capital case) promotes more efficient management of the scarce public resources that fund the criminal justice system. This is evident for two reasons.

First, if defense counsel's performance meets constitutional standards during pre-trial and trial proceedings, the costs associated with the appeal, post-conviction

proceedings, and possible re-trials will be lessened. Prosecutors will not have to expend effort defending the performance of the defendant's trial counsel on appeal, nor will they have to engage in expensive post-conviction evidentiary hearings that recreate both the original trial and defense counsel's strategic decisions. Post-conviction proceedings in capital cases are complex, particularly when they involve *Strickland* claims, and typically involve many constitutional and procedural issues; these issues may be revisited in evidentiary hearings in both state and federal courts, each of which has its own appellate process. As a result, post-conviction proceedings are expensive – in some cases more expensive than the original trial.[19]

Moreover, this collateral litigation – which typically occurs several years after the original conviction – often requires significant involvement of the prosecutors and law enforcement personnel who handled in the original proceeding. This can place tremendous burdens on prosecutorial resources. As the Subcommittee on Federal Death Penalty Cases of the Judicial Conference noted, "a number of judges, particularly those with experience reviewing state death penalty trials in federal habeas corpus proceedings underscored the importance of 'doing it right the first time,' i.e., minimizing time-consuming post-conviction proceedings by assuring high quality representation in federal death penalty cases at the trial level."

19. *See, e.g.*, Philip J. Cook & Donna B. Slawson, *The Costs of Processing Murder Cases in North Carolina* (May 1993) at 47, 64-66 (noting that average bifurcated capital trial cost $84,099, average appeal from death sentence costs $22,484, and two post-conviction proceedings cost an average of $254,890); Margot Garey, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L. REV. 1221, 1257 (1985).

JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE ON DEFENDER SERVICES, SUBCOMMITTEE ON FEDERAL DEATH PENALTY CASES, FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION § I.C.1 (1998).

These costs can be limited if defense counsel performs competently during the original proceeding. When counsel for the defendant fulfils their obligations at trial and at sentencing, review of legal issues on direct appeal and in post-conviction proceedings can be more straightforward, conserving tremendous resources.

Second, investigation of mitigating evidence by defense counsel can also conserve resources by helping prosecutors determine at the outset which cases are appropriate under the law for capital sentencing. For example, in the federal system, defense counsel is allowed to make a proffer of mitigating evidence to the prosecutor.[20] A thorough investigation of mitigating evidence by defense counsel at an early stage can uncover facts demonstrating that the death penalty is not appropriate under the law of a particular jurisdiction. As numerous studies have concluded, a murder trial where the death penalty is sought is typically several times as costly as one where it is not.[21] Accordingly, any

20. In seeking the death penalty, the U.S. Attorney must submit a "Death Penalty Evaluation Form," a memorandum, and any written material submitted by defense counsel in opposition to the imposition of the death penalty to the Assistant Attorney General for the Criminal Division. United States Department of Justice, *United States Attorney's Manual* § 9-10.040.

21. A study by a subcommittee of the Judicial Conference found that from 1990 to 1997 the average costs were about four times greater in cases where the death penalty was sought than in comparable cases

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mitigating evidence that defense counsel is able to bring to the prosecutor's attention prior to trial that leads the prosecutor to decide not to seek the death penalty will conserve resources, as well as ensuring that the death penalty is fairly and properly administered. As the Subcommittee on Federal Death Penalty Cases of the Judicial Conference of the United States noted:

> A decision not to seek the death penalty against a defendant has large and immediate cost-saving consequences. The sooner that decision is made, the larger the savings. . . . The process for identifying those defendants should be as expeditious as possible in order to preserve funding and minimize the unnecessary expenditure of resources.

JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE ON DEFENDER SERVICES, SUBCOMMITTEE ON FEDERAL DEATH PENALTY CASES, FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION § II.5 (1998). Obviously, defense counsel who does not investigate mitigating evidence cannot present it.

The importance of these cost savings should not be underestimated. State and local governments are facing a financial crisis of staggering proportions.[22] To a county or

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where it was not sought. JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE ON DEFENDER SERVICES, SUBCOMMITTEE ON FEDERAL DEATH PENALTY CASES, FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION (1998).

22. *See, e.g.*, R. Gold & R. Gavin, *Falling Short: Fiscal Crises Force States to Endure Painful Choices*, WALL ST. J., Oct. 7, 2002, (Cont'd)

city in straitened circumstances, a capital case – in which it typically must fund both the prosecution and the defense – can impose a major financial burden.[23] Effective defense counsel can play an important role in ensuring that those costs are incurred only when appropriate under the law, and can help free up scarce prosecutorial and law enforcement resources to focus on combating additional crime.

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at A1 (noting combined state budget deficit is $58 billion); W. Eggers, *Memo to Rookie Governors: Cut, Cut, Cut*, WALL ST. J., Nov. 6, 2002, at A22.

23. The burden can be substantial. *See, e.g.*, R. Gold, *Counties Struggle with High Cost of Prosecuting Death-Penalty Cases*, WALL ST. J., Jan. 9, 2002, at B1:

> As a growing number of local governments are discovering. . . . [j]ust prosecuting a capital crime can cost an average of $200,000 to $300,000. . . . Add indigent-defense lawyers, an almost-automatic appeal and a trial transcript, and death-penalty cases can easily cost many times that amount. . . . The cost, county officials say, can be an unexpected and severe budgetary shock—much like a natural disaster. . . . To pay up, counties must raise taxes, cut services, or both.

A. Liptak, *Citing Cost, Judge Rejects Death Penalty*, N.Y. TIMES, Aug. 18, 2002, at 18 (citing the county's inability to afford a capital trial, a judge in Vinton County, Ohio prevented prosecutors from seeking the death penalty against the alleged murderer of a college student); L. Olsen, *State Fund Doesn't Provide Much Relief From Costs of Capital Cases*, Seattle Post-Intelligencer, Aug. 8, 2001, at A8 (noting that in one county in Washington State, the cost of one capital murder trial was $15 per resident).

CONCLUSION

Like the country as a whole, the signatories of this brief have differing views on the death penalty, but all agree that if we are to have a death penalty, it must be administered fairly and with competent defense counsel. As prosecutors, we all agree that an essential aspect of competent performance by defense counsel is that defense counsel must adequately investigate mitigating circumstances. For the reasons set forth herein, *amici* respectfully request that the Court reverse the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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* Counsel would like to recognize the considerable assistance of Michou H.M. Nguyen

APPENDIX

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